

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY TURNER KRAMMES,

Defendant-Appellant.

UNPUBLISHED

June 24, 2014

No. 314386

Wayne Circuit Court

LC No. 12-007636-FH

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(b), and domestic violence, MCL 750.81(2). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 25 to 40 years for the second-degree CSC conviction and three months for the domestic violence conviction. We affirm.

This case arises from an incident that occurred on July 11, 2012, in Woodhaven, Michigan. At trial, the victim and defendant's girlfriend testified to the following facts. Defendant awoke his 14-year-old daughter, the victim, in the early morning to watch television. The victim and defendant were in defendant's home, where the victim lived with defendant and defendant's girlfriend. Defendant and the victim lay down together on the couch. Defendant pulled down the victim's shorts, got on top of her, and began touching her genitals with his genitals. Defendant then penetrated the victim and began having intercourse with her. Defendant's girlfriend, who had been asleep upstairs, came downstairs and witnessed defendant and the victim having intercourse. Defendant's girlfriend contacted the police later that morning. In addition to the victim and defendant's girlfriend, defendant's older daughter testified that defendant had committed sexual acts against her 20 years before. Defendant testified on his own behalf, and denied any sexual contact or penetration with the victim or his older daughter. Defendant asserted that his girlfriend reported him to police because he had ended their relationship the morning after the alleged incident because she had a drug addiction. Defendant further stated that he was convicted after taking a plea for the sexual assault of his older daughter, and served three and a half years in prison. According to defendant, he took a plea to avoid losing custody of his older daughter.

Defendant first argues that the trial court abused its discretion by admitting the testimony of defendant's older daughter regarding instances of prior sexual contact with a minor pursuant to MCL 768.27a because the evidence was unduly prejudicial. We disagree.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). "A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Wacławski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). "Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

In the trial court, the prosecution moved for the admission of testimony from defendant's older daughter pursuant to MCL 768.27a and MRE 404(b). Defendant objected to the admission of the testimony pursuant to MRE 403, arguing that the evidence was more prejudicial than probative. The trial court admitted the evidence over defendant's objection. Defendant asserts that the trial court erred because it failed to specify whether the testimony was admitted pursuant to MCL 768.27a or MRE 404(b). However, if the trial court evaluates and admits the evidence pursuant to MCL 768.27a, it need not consider whether the requirements of MRE 404(b) were met. *People v Smith*, 282 Mich App 191, 205; 772 NW2d 428 (2009). Because the evidence was properly admissible pursuant to MCL 768.27a, no further application or consideration of MRE 404(b) was necessary by the trial court.¹

Despite the admissibility of the testimony pursuant to MCL 768.27a, the evidence is still subject to the balancing test of MRE 403. *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012). MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. In *Watkins*, our Supreme Court held that evidence admissible pursuant to MCL 768.27a is still subject to analysis pursuant to MRE 403. *Watkins*, 491 Mich at 481; see also *People v Pattison*, 276 Mich App 613, 620-621; 741 NW2d 558 (2007). The *Watkins* Court held that MCL 768.27a rejected MRE 404(b), which prohibits propensity evidence, in favor of a statutory scheme that permits a propensity inference to be drawn by the jury regarding a defendant's previous sexual contact with a minor. *Watkins*, 491 Mich at 486-487. "Accordingly, when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Id.* at 487. However, this does not render MCL 768.27a evidence immune from being inadmissible, and the Court outlined several other considerations that could allow a trial court to exclude MCL 768.27a evidence under MRE 403:

- (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the

¹ On appeal, defendant does not argue that the evidence was not admissible pursuant to MCL 768.27a, only that the evidence was unduly prejudicial pursuant to MRE 403.

evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id.* at 487-488.]

Although the trial court did not conduct an MRE 403 analysis on the record, an independent analysis reveals that the probative value of the evidence outweighs the prejudice to defendant.² The acts committed by defendant against the victim and against his older daughter were similar. Defendant's current and prior actions included sexual contact and penetration against his biological daughters while his daughters were minors and lived with defendant. Further, defendant's older daughter testified that defendant's actions toward her occurred frequently, there was no evidence of intervening acts, and the reliability of the evidence was supported by other facts in evidence, namely that defendant was convicted of an offense related to the sexual assault of his older daughter. In addition, there was a need for the evidence. There was an eyewitness to the incident, but the victim changed her testimony two days before the trial and the evidence supported the reliability of both the victim and the eye witness.³ While defendant's prior acts occurred 20 years before the incident occurred, that fact is not dispositive. The *Watkins* Court held that the list of considerations is "meant to be illustrative rather than exhaustive." *Id.* at 488. Further, "[t]he remoteness of the other acts affects the weight of the evidence rather than its admissibility." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). Here, the extended time period between the acts does not outweigh the probative value of the evidence, which includes defendant's propensity to commit sexual crimes against his minor daughters, the similarity of his actions, and the necessity to support the reliability of the evidence. See *Watkins*, 491 Mich at 486-488.

Defendant also asserts that the trial court read the jury an incorrect jury instruction, which contributed to the trial court's abuse of discretion. The trial court provided the jury instruction for MRE 404(b), despite the fact that the evidence was admitted pursuant to MCL 768.27a. The jury instructions were approved by defendant at trial, and thus, waived. *People v Meissner*, 294 Mich App 438, 458; 812 NW2d 37 (2011). Moreover, the error with the jury instruction was harmless because the jury instruction for MRE 404(b) is more restrictive than the jury instruction

² "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26.

³ Defendant argues that the trial court should have conducted an additional MRE 403 balancing test after the victim decided to change her testimony. However, defendant did not request that the judge reconsider the testimony, so the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Moreover, the victim's decision to testify against defendant lends further support to the admission of the evidence pursuant to the factors in *Watkins*. *Watkins*, 491 Mich at 487-488.

for MCL 768.27a. The error benefited defendant and did not prejudice him, so the error was not outcome determinative. See *Williams*, 483 Mich at 243.

Defendant next argues that the trial court erred by departing from the sentencing guidelines and sentencing defendant to 25 to 40 years for his second-degree CSC conviction because the departure was disproportionate, and thus, violated defendant's constitutional guarantee against cruel or unusual punishment. We disagree.

In reviewing a departure from the guidelines range, this Court reviews "the reasons given for a departure for clear error." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred." *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012) (internal citations omitted). "The conclusion that a reason given is objective and verifiable is reviewed as a matter of law." *Smith*, 482 Mich at 300. "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Id.* "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.* In determining whether the reasons given are substantial and compelling, this Court should recognize that "the trial court was in the better position to make such a determination" and should give "this determination appropriate deference." *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003). Additionally, this Court reviews unpreserved constitutional issues for plain error. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).⁴

The general rule is that a court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012). "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Departure should occur only in exceptional cases, and must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Smith*, 482 Mich at 300-301; *Babcock*, 469 Mich at 257. To be proportionate, the sentence "must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been." *Smith*, 482 Mich at 318.

Defendant's sentencing guidelines were 62 to 228 months, and the trial court exceeded the guidelines and sentenced defendant to twenty-five to forty years. At sentencing, the trial judge stated the following reasons for her departure:

THE COURT: Then on the charge of criminal sexual conduct in the second degree, I do think that you are a predator. You've now had sex with two of your daughters which is just, quite frankly, unbelievable to me.

⁴ Defendant did not raise his argument regarding cruel and unusual punishment in the trial court, so the issue is unpreserved. *Metamora Water*, 276 Mich App at 382.

* * *

THE COURT: And I am going to exceed the guidelines because I think you are a predator and I think you'd do it to another child if you are released from jail.

The court did not err when it departed from the sentencing guidelines. The court found that defendant had sex with two of his daughters and that the court believed defendant would continue his predatory conduct in the future. Generally, “[a] court's opinion or speculation about a defendant's future dangerousness is not objective or verifiable.” *Anderson*, 298 Mich App at 189. “But the trial court may base a sentencing departure on a defendant's future dangerousness if objective and verifiable facts support the court's conclusion, such as the defendant's past failures to rehabilitate or demonstrated obsessive or uncontrollable urges to commit certain offenses.” *Id.* at 189-190 (internal quotation marks and citation omitted). “Recurring and escalating acts of violence are objective and verifiable because they are external occurrences that can be confirmed.” *Id.* at 190. In this case, defendant committed sexual acts against his older daughter, was convicted, and served three and a half years in prison. Years later, defendant committed similar, more serious crimes against another minor daughter. The trial court's concerns about defendant's recidivism were justified by the record, and thus, constitute a substantial and compelling reason to depart from the sentencing guidelines. Further, given the seriousness of defendant's crimes and criminal history, defendant's sentence is not disproportionate to his crime. *Smith*, 482 Mich at 300, 318.

Defendant also asserts that his sentence constitutes cruel or unusual punishment, prohibited by the Michigan Constitution. Const 1963 art 1, § 16. Because the trial court did not err in its upward departure from the sentencing guidelines and defendant's sentence was proportionate to his crime, the punishment did not violate the Constitution. “[A] proportionate sentence does not constitute cruel or unusual punishment.” *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004). Therefore, the trial court did not clearly err in sentencing defendant because the proportionate sentence did not constitute cruel or unusual punishment.

In sum, the trial court did not abuse its discretion when it admitted evidence pursuant to MCL 768.27a because the probative value of the evidence outweighed the prejudice to defendant pursuant to MRE 403. See *Watkins*, 491 Mich at 486-488. The trial court did not abuse its discretion when it departed upward from the sentencing guidelines range because it provided a substantial and compelling reason for the upward departure. See *Anderson*, 298 Mich App at 183, 189-190. The trial court did not clearly err in its sentencing because the proportionate sentence did not violate the constitutional prohibition against cruel or unusual punishment. See *Drohan*, 264 Mich App at 92.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood